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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PUBLIC CITIZEN,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

WASHINGTON LEGAL FOUNDATION,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE, and
AMERICAN BAR ASSOCIATION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF PEOPLE FOR THE AMERICAN WAY ACTION FUND AND ALLIANCE FOR JUSTICE AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE [1]

Amicus Curiae People for the American Way Action Fund is a member-based, nonpartisan citizens' organization which seeks to promote and protect civil and constitutional rights, and works to preserve the independence

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[1] Written consent to the filing of this brief amicus curiae has been obtained from the parties to this case. Copies of the consent

of the federal judiciary. It is the advocacy arm of People for the American Way, which was founded in 1980 by a group of religious, civic, and educational leaders devoted to the Nation's heritage of tolerance and pluralism.

Since 1985, People for the American Way Action Fund has monitored the nomination and selection of members of the federal judiciary. It has done so in part by conducting research and investigations of nominees and potential nominees.

Amicus Alliance for Justice is a national association of public interest law organizations concerned with issues affecting access to the justice system. Since January 1985, the Alliance has operated the Judicial Selection Project, an ongoing, full-time project to monitor the federal judicial selection and confirmation process. The Project's steering committee is comprised of over thirty individuals representing leading public interest, civil rights, and labor groups. The Project seeks to promote an independent judiciary committed to equal justice, and it encourages the recruitment and nomination of highly qualified women and minorities. The Alliance's Project reviews every nomination to the federal bench by reviewing the cases in which the nominee has participated, legal writings, speeches, and other relevant materials, and by conducting confidential interviews with individuals who know or who have worked with, and opposite to, the nominee.

The staffs of the People of the American Way Action Fund and the Alliance for Justice provide information to the appellee American Bar Association (the "ABA") and its Standing Committee on the Federal Judiciary (the "ABA Committee"). The ABA Committee routinely exchanges information with the Executive Branch concerning judicial appointments. It is particularly well

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letters have been filed with this brief. Although Amici are filing this brief in support of appellees, which include the Department of Justice, Amici's interests differ in some respects from those of the Department, as noted below.

situated to provide advice concerning nominees and prospective nominees. While Amici have often disagreed with positions taken by the ABA, Amici nonetheless recognize that the ABA is the largest and best known professional organization of lawyers in the United States. By virtue of its professional experience and longstanding personal and professional contact with most candidates for the federal bench, the ABA is able to make well-informed judgments about the qualifications of actual and potential nominees. For this reason, the Department of Justice routinely gives the ABA Committee early notice of prospective nominees.[2] Amici recognize that although the ABA Committee process has been subject to criticism, the Committee is nonetheless important in promoting excellence in the federal judiciary.

When investigating prospective nominees, the Committee solicits, receives, and evaluates information from a wide array of sources. These include the candidate's responses to a comprehensive questionnaire developed by the ABA expressly for the Committee's use, and a study of the candidate's legal writings.[3] Since the ABA's establishment of the Committee in 1946,[4] it has also served as a valuable conduit for information and advice provided by others. The Committee conducts interviews with, and receives information from, persons in a position to evaluate the candidate, typically including judges, law professors, lawyers, and others with knowledge of the candidate. All such interviews are confidential.[5]

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[2] The Department began this practice in 1952—more than six years after the Committee came into existence. Annual Report of the American Bar Association, 77 A.B.A. Ann. Rep. 215-17 (1952).

[3] American Bar Association, *Standing Committee on Federal Judiciary—What It Is and How It Works* (1983), JA 43, 47.

[4] D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 83 (1988). The Committee took its present form in 1949. *Id.* The ABA Committee was created by the ABA, not at the request of the federal government. *Id.*

[5] American Bar Association, *Standing Committee on Federal Judiciary—What It Is and How It Works* (1983), JA 43, 46-52. The process also involves an interview with the prospective nominee,

The information provided to the ABA Committee by individuals associated with Amici consists of information concerning particular candidates, as well as the names of knowledgeable individuals familiar with the nominees and willing to provide additional information.[6] The views of these Amici are not always shared by other individuals and groups, and are sometimes controversial. Information has been supplied to the ABA Committee rather than to the Department of Justice because these Amici and similar groups have had interests that sometimes differ from those of the Executive, which routinely supports Administration candidates whose names are provided to the ABA Committee. Some of these candidates have been opposed by Amici. The ABA Committee has always treated such information in strictest confidence, a fact which greatly facilitates the gathering of information. While Amici also may express their views in the context of the Senate confirmation process, that is no substitute for the opportunity to provide views in confidence to the ABA Committee.

While these Amici strongly support application of sunshine requirements to government agencies, they oppose its application here. The ability of Amici meaningfully to participate in the judicial selection process will be directly and adversely affected by any decision which treats the ABA Committee as an arm of the government and subjects it to the regulatory requirements of the Federal Advisory Committee Act.[7]

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who has the opportunity to respond to any potentially adverse information and to provide any additional information bearing on it. *Id.* at 48.

[6] At one time the Alliance for Justice and other groups were routinely supplied with the names of nominees by the ABA Committee to facilitate comment. That practice ceased in 1985. JA 17-19. Amici now secure the names of potential nominees from public and other non-ABA Committee sources.

[7] 5 U.S.C. app. (1982), *amended by* 5 U.S.C. app. (Supp. IV 1986) (the "Act").

In particular, subjecting the ABA Committee to the Act would chill the ABA's internal deliberations and discourage Amici and other citizen groups from participation in the nomination process. Application of the Act would require that the ABA Committee's evaluative meetings be chaired by federal officials, presumably from the Department of Justice,[8] and that the Committee's deliberations—as well as communications of these Amici—be made public unless the Department determines that one of the exemptions applies.[9]

Confidentiality is of crucial importance to the ABA Committee's process. Confidentiality encourages participation by those with knowledge about the candidate, maximizes honest and candid expression about sensitive matters, protects participants from harassment or retribution, and often saves candidates themselves from personal embarrassment. The need for confidentiality is particularly compelling because many of those most knowledgeable about a particular candidate's shortcomings may face the prospect of later appearing before that individual as advocate or litigant.[10] Without any assurances that their candid assessments of judicial candidates would not be disclosed to federal officials, those who now supply information to the ABA Committee would be less willing to do so.

SUMMARY OF ARGUMENT

I.

No reasonable construction of the Federal Advisory Committee Act (the "Act") would render it applicable to the ABA Committee. The statute defines "advisory committee" as including any committee which is "estab-

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[8] *See* Act §§ 10(a)-(c), (e), (f).

[9] Act §§ 10(b), (d), *citing* 5 U.S.C. §§ 552, 552b.

[10] *See In re Petition of Illinois Judicial Inquiry Board*, 128 Ill. App. 3d 798, 804, 471 N.E.2d 601, 604 (1984) ("An attorney would understandably be reluctant to publicly denounce the qualifications of a judge he must later practice before.")

lished or utilized" by the President or any agency. The court below read the term "utilized" to cover virtually any group, whether private or public, that receives information from and offers advice to any federal agency, and on that basis held that the Act applied to the ABA Committee.

Such a reading cannot be squared with the statute's structure and purpose. The Act was designed to prevent the proliferation of advisory committees created by federal agencies. It bars all advisory committees from meeting or taking any action until they have filed a federally-specified charter, and it prohibits advisory committees from meeting under any circumstances except in the presence of a federal official. Congress gave agency officials the powers to regulate the membership of advisory committees and to terminate their existence; to disclose their papers and internal deliberations to the public; and to disclose the communications they receive from persons such as Amici. It is inconceivable that Congress could have intended to subject groups of citizens such as the ABA Committee to such intrusions. The required presence of a federal official and the threat of disclosure of communications by the government would be particularly inappropriate where, as here, positions taken by groups such as Amici may be inconsistent with those of the Executive Branch.

There is no hint anywhere in the legislative history that Congress meant the Act to apply to groups such as the ABA Committee. Indeed, the legislative history shows the contrary. Throughout the legislative history, Congress focused on groups "established" or "organized" or "create[d]" by the federal government. The addition of the term "utilized" to the bill did not occur until the Conference Committee report, and plainly was not designed to materially alter the scope of the Act. The very fact that the Conference Committee gave no explanation for the addition suggests that it was inconsequential. It is apparent from the history of the bill that insertion

of the term "utilized" was meant only to ensure that the Act would cover organizations created by the government before enactment, and that it would cover organizations created by quasi-government agencies such as the National Academy of Sciences. There is no suggestion that groups not created "by or for" the federal government would be covered. The Conference Committee Report made that clear: "[T]he Act does not apply to . . . advisory committees not directly established *by or for* such [federal] agencies." H.R. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972) (emphasis added). Here, neither the ABA nor the ABA Committee was created "by or for" the Executive Branch; indeed, both were organized years before the ABA Committee assumed its present role.

Further and compelling support for a narrowing construction arises from the long-standing principle that, whenever possible, statutes should be read to avoid constitutional questions.

II.

If construed to apply to the ABA Committee, the Act would violate the First Amendment. The Committee's work consists primarily of communications with interested parties, deliberations concerning the qualifications of prospective judicial nominees, and the submission of views to the government. Individuals associated with groups such as Amici supply information to the ABA Committee. All such conduct is entitled to the very highest level of First Amendment protection. The First Amendment plainly protects the rights "to speak freely, to advocate ideas, to associate with others, and to petition [the] government. . . ." *Smith v. Arkansas State Highway Employees*, 401 U.S. 463, 464 (1978) (per curiam). While the government does not seek directly to prohibit activities of the Committee or these Amici, decisions of this Court have long made clear that compelled disclosures concerning the confidential internal deliberations of private groups violate the First Amendment. The Act's provisions—particularly the required presence

of a federal official and the prospect of public disclosure and outright termination—would severely chill constitutionally protected rights of expression, association, and petition. The positions of the ABA Committee, and particularly the positions of these Amici, are sometimes at variance with those of the Administration. No governmental interest here can possibly justify such governmental intrusion; and the Court has never remotely sanctioned incursions such as these.

ARGUMENT

I. THE ABA COMMITTEE IS NOT AN "ADVISORY COMMITTEE" WITHIN THE MEANING OF THE FEDERAL ADVISORY COMMITTEE ACT.

In the opinion below, the district court first concluded that the ABA Committee was an "advisory committee" subject to the Act's full range of organizational, regulatory, and disclosure requirements.[11] In light of that conclusion, the court then deemed it necessary to reach and resolve the question of the Act's constitutionality under the Appointments Clause.[12] In fact this Court need not reach that issue—or any of the constitutional questions presented here. The structure and legislative history of the Act demonstrate that Congress never intended it to cover groups such as the ABA Committee because they were not established by or for any government agency or government-funded agency.

A. The Structure of the Act Shows That Congress Intended Only To Regulate Advisory Committees Created By or For the Federal Government.

The Act defines an " 'advisory committee' " as:

> any committee . . . which is—
>
> (A) established by statute or reorganization plan, or

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[11] *Washington Legal Foundation v. Dept. of Justice*, 691 F. Supp. 483, 491 (D.D.C.) (*"WLF"*), *jurisdiction noted*, 109 S. Ct. 526 (1988).

[12] *Id.* at 491-92.

> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . . .[13]

There is no suggestion, by either appellants or the court below, that the ABA Committee comes within the scope of paragraph (A). Nor can it be contended that the Committee was "established" by the President or an agency under Paragraph (B) or (C). Thus, if the Committee is covered by the Act at all, it is only because it has been "utilized" by the President or by an agency.[14]

The court below correctly acknowledged that "reliance on the plain language of FACA alone is not entirely satisfactory because FACA 'contains a very broad, imprecise definition, and in this respect is not a model of draftsmanship. . . .' "[15] Despite this admonition, the district court did precisely what it had warned against: relying principally on the dictionary, rather than the Act itself, the court gave the term "utilized" an exceedingly literal construction, sweeping into the Act's regulatory regime not only the ABA Committee, but any group of private individuals that receives information from and offers advice to any federal agency.[16]

It is of course true that the President "utilizes" the ABA Committee, in the literal sense that he and the Department of Justice at times "make use of" the Committee's ratings of judicial nominees.[17] But to extend

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[13] Act § 3(2).

[14] Act §§ 3(2)(B), (C).

[15] *WLF*, 691 F. Supp. at 488 (citations omitted).

[16] *Id.*

[17] *Id.* There is no legal requirement that the Committee be consulted at all; and the Executive has no legal or other obligation ever to accept the Committee's advice. It is noteworthy that of the eleven prospective nominees whom the Committee rated "not qualified" between 1977 and 1984, the President nominated more than

the Act's coverage to every "committee, board, commission, council, conference, panel, task force, or other similar group" [18] whose advice or recommendations any federal agency has ever "made use of" is to give the federal government a kind of reverse Midas touch—the power to turn any private entity whose advice is ever heeded into a part of the federal bureaucracy. That expansive reading is fundamentally at odds with the structure and purpose of the Act.

As Justice Frankfurter long ago noted: "A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated." [19] Whatever else in the Act may be imprecise, one thing is clear: Congress passed the Act because of mounting concern over the proliferation of federal advisory committees, and the attendant drain they imposed on the human and financial resources of the federal government.[20]

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half. D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 94 (1988).

[18] Act § 3(2).

[19] *United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

[20] In the extensive legislative history preceding passage of the Act, members of Congress repeatedly voiced concern about the vast amount of federal money (estimated in 1971 at $75 million annually) spent on the work of advisory committees, that in many instances were "inactive, meaningless, obsolete [or] redundant." H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970). *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 3, 5-6 (1972); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 58, 61 (1971); 118 Cong. Rec. 16,296, 16,297-98, 16,301-02 (1972) (remarks of Reps. Holifield & Moss); 118 Cong. Rec. 30,269, 30,272, 30,280 (1972) (remarks of Sens. Metcalf & Roth); 118 Cong. Rec. 31,224, 31,225 (1972) (remarks of Sen. Percy). As the House Committee noted, in one particularly egregious instance a Presidential advisory committee spent $1.8 million in federal money to produce a report that the President rejected even before it had been issued. H.R. Rep. No. 1731, 91st Cong., 2d Sess. 12 (1970).

The Act was plainly an effort to limit, rather than increase, the number of such groups. Thus, the first section of the Act carries an explicit congressional directive that the number of such committees "be kept to the minimum necessary," that new advisory committees "be established only when they are determined to be essential," and that existing committees "be terminated when they are no longer carrying out the purposes for which they were established."[21] To read the Act to cover a private group simply because the Executive has made use of its advice is to ignore Congress' fundamental intent.

Every other portion of the statute also plainly suggests an intention to regulate only committees that, unlike the ABA,[22] were created by or for the federal government or government-funded entities. Thus, in the prefatory language of the Act Congress mentioned only committees "which have been *established* to advise officers and agencies in the executive branch. . . ."[23] That this language refers to committees established by the government or government-funded entities is confirmed by the succeeding portions of the Act. Those confer upon the Executive the authority and responsibility to perform a panoply of duties that make sense only with respect to quasi-governmental bodies created by or for the federal government and responsible to it. Most significantly, the Act confers upon the President (and in some instances, the Congress) the power to create and terminate federal advisory committees—powers that could hardly apply to a voluntarily-formed group of private citizens who share information with their government.[24] The Act requires that federal officials attend all advisory

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[21] Act §§ 2(b)(2) & (3).

[22] The ABA was privately created in 1878. The ABA Committee was created in 1946, six years before the Department of Justice began to supply the names of prospective nominees to the Committee. *See* notes 2 & 4 *supra*.

[23] Act § 2(a) (emphasis added).

[24] *See, e.g.*, Act §§ 6(c), 9(a), 14(a), (b).

committee meetings,[25] a matter emphasized in the conference report, which stated that "a designated officer or employee of the Government [must] attend each advisory committee meeting. No such meeting may be conducted in his absence or without his approval." [26] In addition, the Executive has the responsibility and duty to establish "uniform fair rates of pay" for committee members; [27] to "prescribe administrative guidelines and management controls applicable to advisory committees"; [28] to report to the Congress within a designated time period either adopting each committee's recommendations or explaining the reasons for rejecting them; [29] to keep records of all funds at the committee's disposal; [30] and to "provid[e] support services for each advisory committee established by or reporting to it." [31]

Likewise, the Act imposes upon each federal advisory committee and its members a host of obligations that have no discernible purpose when applied to private organizations not created by or for the federal government. Thus, if Congress had in mind private organizations like the ABA Committee, it is unthinkable that it would have imposed requirements for composition of membership; [32] or prohibited members from "meet[ing] or tak[ing] any action" until they had filed a charter specifying, *inter alia*, their objectives and the scope of their activities, the period of time necessary for them to complete their purpose, the federal officials responsible for providing them support, their estimated annual operating costs, and their expected termination date.[33] These requirements are con-

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[25] Act § 10(e).

[26] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 11 (1972).

[27] Act § 7(d)(1).

[28] Act § 7(c).

[29] Act § 6(b).

[30] Act § 12(a).

[31] Act § 12(b).

[32] Act § 5(b)(2).

[33] *See* Act § 9(c).

sistent only with a congressional purpose to regulate committees formally created by statute, the President, or a federal agency or government-funded agency.[34]

B. The Legislative History of the Act Shows That It Was Not Intended To Cover Entities Like the ABA That Were Not Created "By or For" the Government.

The extensive legislative history of the Act confirms that Congress never intended it to cover entities like the ABA Committee that were not created "by or for" the government.

Initially, each chamber adopted a bill whose scope was expressly limited to advisory committees created by the federal government.[35] Neither bill contained any reference to committees "utilized" by the government. Rather, that phrase appeared for the first time in the bill approved by the Conference Committee.[36] The Conference Report offered no explanation for this change, other than to say that "[t]he conference substitute . . . adopts the House definition of 'advisory committee' with modification." [37] While the Conference Committee report is silent as to why the term "utilized" was added, its purpose is

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[34] *See American Tobacco Co. v. Patterson*, 465 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid . . . unreasonable results whenever possible.")

[35] The House bill defined "advisory committee" as "any committee . . . which is . . . (A) established by statute or reorganization plan, or (B) established by the President, or (C) established by one or more agencies, ..." 118 Cong. Rec. 16,296, 16,300 (1972). Likewise, the Senate bill covered only committees "established or organized under any statute or by the President or any officer of the Government for the purpose of furnishing advice, recommendations, or information to any officer or agency, or to any such officer or agency and to the Congress . . . ." 118 Cong. Rec. 30,269, 30,269 (1972).

[36] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 2 (1972). *Compare id.* (Conference Report) *with* 118 Cong. Rec. 16,296, 16,300 (1972) (House bill as passed).

[37] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 9 (1972).

quite clear. The legislative history shows that the Conference Committee's addition was designed to do no more than resolve a relatively minor ambiguity in the Act.

During the earliest Senate hearings on the subject, the Congress directed the Office of Management and Budget ("OMB") to produce a complete listing of all existing advisory committees that would be covered by the Act. For this purpose, OMB relied upon a 1962 Executive Order, No. 11007, which defined "advisory committee" to include "any committee, board, commission, council, conference, panel, task force, or other similar group" that is either "formed by a department or agency of the Government" or "is being *utilized* by a department or agency in the same manner as a Government-formed advisory committee." [38]

The Executive Order was not designed to reach groups not formed by or for the government, as shown by OMB's response to Congress' request in 1971 to list all Advisory Committees covered by the Executive Order.[39] After conducting an exhaustive survey of every federal department and agency, including the Department of Justice, OMB produced a list of all existing federal advisory committees, as defined in the Executive Order; and the list was placed in the legislative record.[40] So far as Amici can determine, every entity listed was something created or established by the government or a government-funded agency. Even if that were not the case, OMB's working assumption, and the assumption of Congress in passing the legislation, was that the list included only committees "organized" or "established" or "formed" by the federal government.[41] Indeed, the

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[38] Exec. Order No. 11007 § 2(a) (1962) (emphasis added).

[39] *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701, 702 (1971).

[40] *Id.* at 701-750.

[41] H.R. Rep. No. 1017, 92d Cong., 2d Sess. 2-4 (1972); S. Rep. No. 1098, 92d Cong., 2d Sess. 3, 7 (1972); H.R. Rep. No. 1731, 91st Cong., 2d Sess. 10-11, 25 (1972).

vast majority of the committees on the list were expressly identified as having been created by a specific act of either Congress or the Executive. Virtually every entity actually included the term "advisory committee," or "task force," or a similar designation in its title, indicating that it was created at the government's behest.[42]

Most significantly, although OMB's list names 1162 federal advisory committees, including six committees associated with the Department of Justice, it makes no mention of the ABA or the ABA Committee. That omission could hardly be ascribed to oversight; certainly Congress, the Department of Justice, and OMB all knew that for more than two decades the ABA Committee had been actively involved in advising both the Executive Branch and the Senate about the qualifications of judicial nominees. Moreover, although many committees were named by OMB and others were discussed during the lengthy congressional hearings and debates,[43] the legislative record contains no hint that anyone in Congress believed the ABA or other groups not created by or for the government would be covered.

The OMB list became the focus of the congressional committees as the bill progressed through the House and

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[42] *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701-750 (1971). A private group established at "the request of" a federal agency would, of course, be considered to have been "established" for the government. For example, the Advisory Council on Federal Reports was considered to be "established" by the Office of Management and Budget because it was "organized by several national business organizations at the request of the Office of Management and Budget." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972). *See also* S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). As noted earlier, that is not the case with respect to the ABA Committee.

[43] *E.g.*, H.R. Rep. No. 1731, 91st Cong., 2d Sess. 16 (1970); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 14-16, 24, 40 (1971); 118 Cong. Rec. 16,296, 16,302-03 (1972) (remarks of Rep. Dingell).

Senate.[44] The crux of the legislation, as reflected in both the language of the bills and the committee reports, continued to be on committees "established," "organized," or "create[d]" by the federal government.[45] While there was concern that OMB might have omitted certain advisory committees because of the difficulties of compiling a comprehensive list,[46] no dissatisfaction was expressed with the standard used in compiling the list, with one exception relevant here.[47] That exception concerned a committee " 'not formed by a department or agency, when it is being *utilized by* a department or agency' " [48]—a category which the House Committee believed had been improperly excluded.[49] What is significant, however, is that the advisory committees that the House Committee believed should have been included were not privately-created organizations like the ABA, but rather were (1) advisory committees formed by or for the federal government before the effective date of

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[44] H.R. Rep. No. 1731, 91st Cong., 2d Sess. (1970) (*passim*); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 77-78 (1971); *Advisory Committees: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess. 701-750 (1971).

[45] S. Rep. No. 1098, 92d Cong., 2d Sess. 6-7 (1972); H.R. Rep. No. 1017, 92d Cong., 2d Sess. 1 (1972).

[46] H.R. Rep. No. 1017, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 1731, 91st Cong., 2d Sess. 10-11, 13-14 (1970); *Advisory Committees: Hearings Before the Subcomm. of the Committee on Government Operations, House of Representatives*, 92d Cong., 1st Sess. 77-78 (1971); 118 Cong. Rec. 31,420, 31,421 (1972) (remarks of Rep. Holifield).

[47] The House Committee also expressed concern that OMB's standard did not include committees composed wholly of officers or employees of the federal government, and that it did not include committees established by Congress or formed by the President. H.R. Rep. No. 1017, 92d Cong., 2d Sess. 3-4 (1972).

[48] H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970) (emphasis added; citation omitted).

[49] *Id.*

the Act, and (2) organizations created by groups such as the National Academy of Sciences ("NAS") which entities themselves were organized by the government and were quasi-governmental in nature.[50]

It was evidently this concern that ultimately led the Conference Committee to amend the language to include groups "utilized" by the government. There is no suggestion anywhere in the committee reports, the floor debates, or any other legislative history cited by appellants that the term "utilized" was intended to include groups that were not created by or for the federal government.[51] Indeed, the very language of the Conference Report shows the contrary, stating:

> The Act does not apply to persons or organizations *which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.*[52]

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[50] *Id.* Ironically, a committee formed by the NAS has since been held *not* to be subject to the Act. *Lombardo v. Handler*, 397 F. Supp. 792 (D.D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

[51] The best that appellants can find in the entire legislative history is this snippet in the Senate report:

> The intention is to interpret the words "established" and "organized" in their most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions of this bill.

Brief of Appellant Washington Legal Foundation at 21, *citing* S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972) (appellant's emphasis omitted). *See also* Brief for Appellant Public Citizen at 21 (citing same).

Amici do not dispute that the Senate meant to cover a broad range of groups "established" or "organized" by the government. But the passage does not support the position for which appellants cite it; namely, the contention that the term "utilized" applies to groups *not* established by or for the government. To the contrary, the passage strongly suggests that only groups "established" or "organized" by the government would be covered.

[52] H.R. Rep. No. 1403, 92d Cong., 2d Sess. 10 (1972) (emphasis added).

Thus the Conference Committee intended to exclude private organizations having formal contractual relationships with the government [53] and, even more broadly, to exclude all organizations "not directly established by or for such [Federal] agencies." The ABA Committee was not "directly established by or for" any federal agency.[54] Accordingly, as the Conference Report plainly indicated, the Committee is not subject to the Act.[55]

C. Neither the GSA Regulations Nor Judicial Authority Supports the District Court's Construction of the Act.

The lower court also erred in relying upon recently-adopted GSA regulations, which purport to extend the Act's reach to any committee which a federal agency "utilizes" as " 'a preferred source from which to obtain advice or recommendations . . . .' " [56] To be sure, those regulations define "utilized" very broadly.[57] But they do not purport to cover entities not created by or for the federal government, as the court apparently believed.[58]

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[53] *See also* H.R. Rep. No. 1731, 91st Cong., 2d Sess. 15 (1970).

[54] The ABA Committee was established by the ABA, not at the request of the federal government, six years before it began to receive the names of prospective nominees from the Department of Justice. *See* D. O'Brien, *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 83 (1988); 77 A.B.A. Ann. Rep. 215-17 (1952). Appellant Public Citizen concedes that "the ABA Committee was not 'established' by the Justice Department . . . ." Brief for Appellant Public Citizen at 16.

[55] Appellant Public Citizens contends that the ABA Committee is covered by this legislation because it receives information from the Department of Justice that is not available from other sources, and because the Department receives recommendations from the ABA Committee. Brief for Appellant Public Citizen at 16-17. As discussed in text, it is not the receipt of information and the rendering of advice that determine whether a group will be subject to the Act, but the circumstances of the group's creation.

[56] *WLF*, 691 F. Supp. at 488 (citation omitted).

[57] 41 C.F.R. § 101-6.1003 (1987).

[58] *WLF*, 691 F. Supp. at 488.

Even if they did, the regulations would have no binding force here. The agency has no authority to expand the scope of the Act.[59] Moreover, the definition in question was not a contemporaneous construction of the legislation, but was first adopted more than ten years after passage of the Act.[60] Thus, it obviously sheds no light on Congress' original intention.[61] Far more significant than the amorphous language of the recent GSA regulations is the GSA's consistent conduct over the past seventeen years. During each of those years, since the inception of the Act, the GSA has published an annual report listing every federal advisory committee that in its judgment is covered by the Act. Not even the most recent of these reports—the one for fiscal year 1988, which specifically includes the GSA's interpretive regulations[62]—lists the ABA Committee.[63]

Similarly, before the present decision, so far as we are aware, no case had ever held that the Act reached organizations not created "by or for" the government.[64]

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[59] *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 219-20 (1920). *Cf. Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

[60] Federal Advisory Committee Management, 48 Fed. Reg. 19,324 (1983).

[61] "It is well established that the prestige of a statutory construction by an agency depends crucially upon whether it was promulgated contemporaneously with enactment of the statute . . . ." *Barnett v. Weinberger*, 818 F.2d 953, 960-61 (D.C. Cir. 1987) (footnote omitted). *See General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (administrative interpretation entitled to little deference when first promulgated eight years after enactment).

[62] General Services Administration, Seventeenth Annual Report of the President on Federal Advisory Committees (1988).

[63] *See BankAmerica Corp. v. United States*, 462 U.S. 122, 131 (1983).

[64] *See Consumers Union of United States, Inc. v. Department of Health, Educ. & Welfare*, 409 F. Supp. 473 (D.D.C. 1976), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977) (meetings between trade association and government officials on association's regulatory proposals not subject to Act).

The cases upon which appellants rely, while containing language supporting a broad construction of the statutory language, in fact did not hold that organizations like the ABA Committee are subject to the Act. Neither *Center for Auto Safety v. Tiemann*,[65] which concerned an organization made up entirely of federal and state government officials, nor *National Nutritional Foods Association v. Califano*,[66] in which five physicians met at the federal government's request, held that groups not created "by or for" the government are subject to the Act.

D. The Existence of Serious Constitutional Questions Also Supports a Limiting Construction.

Finally, the existence of serious constitutional questions presented by application of the Act to the ABA Committee strongly supports a limiting construction. From the very beginning, this Court has recognized the principle that statutes should be construed to avoid constitutional questions,[67] and this was reiterated again just last Term:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle . . . has for so long been applied by this Court that it is beyond debate.[68]

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[65] 414 F. Supp. 215 (D.D.C. 1976), *aff'd in part on other grounds sub nom. Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978).

[66] 603 F.2d 327 (2d Cir. 1979).

[67] *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830) (Story, J.) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.") *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

[68] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988) (numerous citations omitted).

Applying this principle, the Court has frequently construed the literal language of a statute narrowly in order to avoid constitutional questions.[69] In cases that are particularly germane here, the Court has crafted from the literal language of the antitrust laws a broad exemption permitting otherwise unlawful collaborations for the purpose of lobbying Congress and the Executive. In *Noerr Motor Freight*[70] the Court held that the explicit prohibition in the Sherman Act against any "contract, combination . . . or conspiracy, in restraint of trade" could not be construed to bar a combination of railroads designed to restrain trade by urging Congress to adopt legislation.[71] The Court rejected the proposition that "the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws[,]"[72] in large part on the ground that such an application of the Sherman Act would invade [illegible]roads' First Amendment rights and "we cannot, [illegible]se, lightly impute to Congress an intent to invade these freedoms."[73] The Court subsequently applied this First Amendment doctrine in *United Mine Workers v. Pennington*,[74] holding the Sherman Act inapplicable to a combination by which a union and large coal operators had conspired to drive

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[69] *United States v. Walter*, 263 U.S. 15 (1923), for example, construed a statute which made it an offense to commit certain frauds against "*any corporation* in which the United States of America is a stockholder." *Id.* at 17 (emphasis added). Brushing aside an argument that the language was "too clear to be cut down," *id.* at 17-18, the Court restricted its meaning to corporations that are instrumentalities of the government, *id.* at 18, on the ground that a broader reading would exceed Congress' constitutional authority. *Id.* at 17. *See also The Vessel "Abby Dodge" v. United States*, 223 U.S. 166, 172-73, 175 (1912).

[70] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

[71] *Id.* at 129 n.1, 136.

[72] *Id.* at 137.

[73] *Id.* at 138.

[74] 381 U.S. 657 (1965).

smaller companies out of business, by jointly persuading the Secretary of Labor to establish an artificially high minimum wage.[75]

As we discuss in the next section, the First Amendment questions presented by application of the Act to the ABA Committee are no less serious than those that led the Court in *Noerr* and *Pennington* to construe the Sherman Act narrowly. They should lead to the same narrowing construction here.[76]

II. APPLICATION OF THE ACT TO THE ABA COMMITTEE WOULD INFRINGE THE FIRST AMENDMENT RIGHTS OF BOTH THE ABA AND AMICI.

Subjecting the activities of the ABA Committee to an intrusive regime of government oversight would deny the ABA, Amici, and the public at large their core First Amendment rights. That denial is particularly unwarranted here since no government interest even remotely justifies such a result.[77]

The activities of the ABA Committee consist substantially of: (1) communications concerning the qualifications of prospective nominees to the federal bench, both with the prospective nominee and with third persons; (2) discussions and deliberations to exchange views on that same subject; and (3) submission of the Commit-

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[75] *Id.* at 660.

[76] The briefs of the Department of Justice and the American Bar Association will presumably address at length the constitutional separation of powers issues presented by application of the Act to the ABA Committee. The existence of these questions provides an independent reason to construe the Act as inapplicable to the ABA Committee.

[77] As a threshold matter, appellants err in suggesting that this Court may not reach the First Amendment issue merely because the ABA did not "present its First Amendment argument to the District Court." Brief for Appellant Public Citizen at 42; *see also* Brief of Appellant Washington Legal Foundation at 43. JA 62-63. In any event, this Court has ample authority to affirm on any legal ground, including grounds not passed upon below. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).

tee's collective opinion to the government.[78] The pertinent activities of the Amici consist of supplying information and advice to the ABA Committee. As the *Noerr* and *Pennington* cases make clear, the First Amendment unequivocally protects the right to engage in each of these activities—"to speak freely, to advocate ideas, to associate with others, and to petition [the] government . . . ."[79]

Indeed, the activities of the ABA Committee and the related activities of these Amici and others qualify for the very highest level of constitutional protection. The First Amendment grants members of the Committee, together with any persons whom they consult, a privilege to carry on what this Court has often called an " 'unfettered interchange of ideas' "[80] free of interference by the government.

The decisions of this Court additionally establish beyond question that the Constitution permits not only the free expression of views, but also their development in concert. The Court has long acknowledged the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for redress of grievances. . . ."[81] "[T]he close nexus between the freedoms of speech and assembly"[82] promotes "[e]ffective advocacy of both public and private points of view, particularly controversial ones. . . ."[83]

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[78] *See* JA 43-52.

[79] *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979) (per curiam).

[80] *E.g., Meyer v. Grant*, 108 S. Ct. 1886, 1891 (1988) (citation omitted).

[81] *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). *Accord, Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 107 S. Ct. 1940, 1947 (1987).

[82] *National Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 460 (1958).

[83] *Id.*

To be sure, the government here does not seek to prohibit either the activities of the ABA Committee or the activities of these Amici. But application of the Act would nevertheless substantially impede those activities and communications. If applied to the ABA Committee, the Act would require the Committee to (1) meet only with the permission of, and in the presence of, a designated officer or employee of the government;[84] and (2) file a charter with the Administrator of the General Services Administration before the Committee "meet[s] or take[s] any action."[85] The Act would also require the Committee automatically to "terminate" after two years unless the Department of Justice renews its existence for successive two-year periods.[86] In addition, the Act would require the Committee to open all meetings to the public and invite interested members of the public to participate,[87] make available transcripts of all meetings,[88] and disclose all "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents *which were made available*" to the Committee.[89] Often the documents required to be disclosed would include materials or information provided by these Amici. Such public disclosure may be avoidable under the Act,[90] but disclosure to the Executive Branch is not; and only the government has the authority to decide which materials if any may be withheld from the public.[91]

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[84] Act §§ 10(e), (f).

[85] Act § 9(c).

[86] Act § 14(a).

[87] Act §§ 10(a)(1), (3).

[88] Act § 11(a).

[89] Act § 10(b) (emphasis added).

[90] Act § 10(d). The President or agency head can close a meeting if he determines that it meets one of the criteria listed in 5 U.S.C. § 552b(c). Act § 10(d).

[91] *See* Act § 10(b), *referring to* 5 U.S.C. § 552(b).

The decisions of this Court make clear that compelled disclosure of the internal affairs of a private organization by government may interfere with First Amendment rights. For example, in the landmark case of *National Association for the Advancement of Colored People v. Alabama*,[92] the Court held that compelled disclosure by the government of private membership lists violated the First Amendment. This Court has often recognized the "vital relationship between freedom to associate and privacy in one's associations,"[93] and has found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[94]

This protection, of course, is not absolute. In situations where private organizations seek to influence government activity, this Court has sustained requirements for disclosure of the names and addresses of persons contributing to organizations engaged in political campaigns and lobbying activities,[95] so long as the organization would not suffer retribution from the disclosure.[96] But the Court has never remotely sanctioned incursions as intrusive as those imposed by the Act, which requires extensive disclosure of the internal discussions of the organization to the government.[97]

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[92] 357 U.S. 449 (1958).

[93] *Id.* at 462.

[94] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). *Accord Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91 (1982). This Court has long recognized that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64.

[95] *Buckley v. Valeo*, 424 U.S. 1 (1976); *United States v. Harriss*, 347 U.S. 612 (1954).

[96] Organizations that legitimately fear retribution from such disclosure are constitutionally exempt even from campaign contribution disclosure requirements. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

[97] In *Buckley v. Valeo*, 424 U.S. 1 (1976) for example, the Court upheld a federal statute requiring certain disclosures relating to

There can be little question here that the adverse impact flowing from application of the Act would place an intolerable burden upon the exercise of protected First Amendment rights. The right of assembly has little meaning if a private group of citizens may not convene in its own name without first seeking leave of the government, without a government representative in its midst to monitor members' speech, and if the group's existence may be terminated by the government. The Act also would adversely affect Amici and similar groups. As noted above, the government's positions on particular candidates is sometimes different from those of Amici, and disclosure to the government would make the existing process of confidential communication and advice impossible.[98]

The dangers of pervasive government intrusion are particularly evident here. Members of the ABA Committee are in contact with third parties, including representatives of these Amici, on a confidential basis in the

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election campaign contributions, in part to deter corruption and to help enforce limitations on contributions. *Id.* at 66-68. No disclosure of internal discussions was involved, and the Court was scrupulous in ascertaining that associational interests were not at risk. Similarly, in *United States v. Harriss*, 347 U.S. 612 (1954), the Court upheld a statute requiring lobbyists to file certain financial information, including the names and addresses of persons whom they represented, on the ground that such disclosure was justified by the need to maintain governmental integrity. Again no disclosure of internal discussions was required.

[98] Appellant Public Citizen asserts that *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978), rejected a similar First Amendment claim. Brief for Appellant Public Citizen at 42-43. That case, however, is readily distinguishable: Its only First Amendment issue concerned communications from the committee to the government—not, as here, communications within the committee and between the committee and third parties. 580 F.2d at 694. Moreover, the committee in *Center for Auto Safety* was formed entirely of state and federal officials acting in their public capacity, and the federal government paid part of its expenses. 580 F.2d at 690. No such factors exist here.

course of their investigations.[99] Many of these contacts have been made with the ABA Committee simply because the organizations and individuals involved have been unwilling to share their information with the Department of Justice. If those discussions with the ABA Committee were disclosed to government officials, few members of the public (and even fewer lawyers) would be willing to offer the sort of frank and candid information that is essential to the selection process. Chilling such expression would not only cripple that process; it would also deprive citizens, including Amici, of their constitutional rights.[100]

Appellant Washington Legal Foundation ("WLF") argues that the ABA Committee should receive no First Amendment protection because it performs "public or quasi-public functions."[101] In this respect WLF appears to be making two separate arguments. The first is that the ABA Committee has forfeited its First Amendment rights because it is engaged in state action.[102] There is simply no support for this view.[103] It is absurd to sug-

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[99] JA 47-48, 50-52.

[100] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (chilling right of association). *See also United States v. Jackson*, 390 U.S. 570, 582 (1968) ("The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.") The availability of a forum in the Senate confirmation process does nothing to relieve this unconstitutional intrusion.

[101] Brief of Appellant Washington Legal Foundation at 43.

[102] The state action argument in any event is irrelevant to the question of First Amendment protection, since the ABA Committee can both be engaged in state action and be entitled to First Amendment protection. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

[103] Appellants cite *Rouse v. Judges of the Circuit Court*, 609 F. Supp. 243, 244-45 (N.D. Ill. 1985) for the proposition that the ABA Committee engages in state action. Brief of Appellant Washington Legal Foundation at 43. In *Rouse*, however, the bar committee investigating prospective judges had a governmentally-conferred veto power over potential candidates. 609 F. Supp. at 244-45. That is not the case here. *See* note 17 *supra*.

gest that the ABA Committee becomes a public body merely by receiving information and offering its views to the government. The government cannot take away a private body's First Amendment rights merely by relying on its advice. Nor does a private organization become a public body by virtue of the Committee's receipt of information not made available to other organizations.[104] There also can be no serious contention that these Amici are state actors or that they are required to forfeit their First Amendment rights as a condition of participation in the process.

Second, relying upon *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), WLF argues that the Act advances a compelling state interest that overrides the ABA's First Amendment rights.[105] The facts of this case are readily distinguishable from *Roberts*. There the Court found that the government's demonstrated objective—the eradication of gender-based discrimination—was both compelling and unrelated to any effort to suppress speech.[106] Moreover, the Jaycees were utterly unable to demonstrate that the state's anti-discrimination legislation "impose[d] any serious burdens on the male members' freedom of . . . association." [107]

The circumstances presented here are demonstrably different. The impact upon the ABA and these Amici is clear. None of the specific governmental objectives articulated in the statute [108] or the legislative history could be

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[104] We note that particular press organizations often receive information from government officials. That receipt hardly deprives them of their First Amendment rights.

[105] Brief of Appellant Washington Legal Foundation at 44.

[106] 468 U.S. at 623-24.

[107] *Id.* at 626. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984), also cited by WLF, is distinguishable on the same basis. *See id.* at 78 (law firm "has not shown how its ability to fulfill [protected] function[s] would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits").

[108] The government's public interest objectives are specified in the "purposes" subsection of the Act. Act § 2(b).

deemed "compelling." [109] Whatever interest the government may have in limiting the number of advisory committees staffed with federal employees and funded with federal dollars is not advanced by applying the Act to a private body that accepts no government funding.

Nor does an abstract interest in disclosure support application of the legislation to the ABA. At least without some evidence of corruption or wrongdoing,[110] requiring disclosure of the ABA Committee's internal deliberations to the government serves no compelling interest, and cannot justify the significant burden on the expressive rights of the ABA and Amici and other members of the public.[111]

There is here no evidence of corruption or improper influence by the ABA or others who participate with it in the nomination process. Contrary to the suggestion of appellant Public Citizen that the ABA Committee "accepts the benefits of being utilized," [112] the only benefit the ABA accepts for its advice is the one all Americans enjoy—the benefit that flows from a judiciary whose members strive to meet the highest standards.

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[109] A long line of decisions establishes unequivocally that "no showing merely of a rational relationship to some colorable state interest" justifies a substantial infringement of First Amendment rights. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

[110] *See Buckley v. Valeo*, 424 U.S. at 66-68; *United States v. Harriss*, 347 U.S. at 625.

[111] Even where there is a compelling interest in controlling corruption, no decision of this Court has required disclosure of the internal workings of the organization. *See* note 97 *supra*.

[112] Brief for Appellant Public Citizen at 44.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Respectfully submitted,

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